Filed 7/10/19 In re T.T. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

In re T.T., a Person Coming Under the Juvenile Court Law.	C088057
TEHAMA COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. B.T. et al., Defendants and Appellants.	(Super. Ct. No. 16JU000064)

J.R. (mother) and B.T. (father), parents of the minor T.T., appeal from the juvenile court's order terminating parental rights. (Welf. & Inst. Code, §§ 366.26, 388.)[1] The parents contend the juvenile court and the Tehama County Department of Social

[1] Undesignated statutory references are to the Welfare and Institutions Code.

Services, Child Welfare Services (Department) failed to comply with the requirements of the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.). The Department concedes the error, but argues father lacks standing to appeal. We will dismiss father's appeal and reverse and remand for limited ICWA proceedings. In all other respects, we will affirm the juvenile court's orders.

FACTUAL AND PROCEDURAL BACKGROUND

A detailed recitation of the facts and non-ICWA related procedural history is unnecessary to our resolution of this appeal.

The three-year-old minor was detained along with his five siblings on November 18, 2016, when a welfare check revealed they were living with their mother and the minor's father in deplorable conditions.

On November 21, 2016, the maternal grandfather stated the family had Pomo and Cherokee Indian heritage but did not believe any of the family members were enrolled with the tribes.

On December 14, 2016, the juvenile court found true the section 300, subdivisions (b) and (g), allegations in the dependency petition and adjudged the minor and his siblings dependents of the juvenile court.

Mother filed a parental notification of Indian status (form ICWA-020) indicating she might have Indian ancestry. The following day, the Department filed a notice of child custody proceeding for an Indian child (form ICWA-030), which listed the minor's name and date of birth and identified the minor's biological mother and father, but provided no additional information regarding either parent's lineal ancestors. The form was sent to the Bureau of Indian Affairs (BIA), the Secretary of the Interior, and the Round Valley Reservation and the Sherwood Valley Rancheria, both Pomo tribes.

The January 2017 disposition report stated the ICWA "does or may apply," noting the minor and his siblings "are or [may be] Indian children with the Round Valley Reservation and/or Sherwood Valley Rancheria." The report also stated notices were sent to the tribes and the BIA on December 16, 2016. The report included a declaration of due diligence documenting the Department's efforts to locate father. At the January 10, 2017 disposition hearing, the court found the ICWA did apply and father's whereabouts remained unknown.

On May 1, 2017, the Department filed return receipts from the BIA, the Department of the Interior, the Sherwood Valley Rancheria, and the Round Valley Reservation, along with a letter from the Round Valley Indian Tribes stating the minor was neither enrolled nor eligible for membership in the tribe.

In a six-month review report filed on June 22, 2017, the Department stated over 90 days had passed since ICWA notices were sent to the Sherwood Valley Rancheria and, in the absence of any response from the tribe, the Department recommended the court find the ICWA does not apply.

At the July 5, 2017, six-month review hearing, the court found the ICWA does not apply. All subsequent reports addressing the ICWA referred to the court's July 5, 2017 finding that the ICWA does not apply.

On March 7, 2018, the Department reported it finally made contact with father while he was incarcerated in the Tehama County jail; he was scheduled for release on March 30, 2018. That same day, father filed a statement regarding parentage (form JV-505) requesting a judgment of parentage, a finding of presumed father status as to the minor, reunification services, and the opportunity for visitation with and return of the minor to his care.

Father made his first appearance in the case at the March 13, 2018 hearing on the Department's section 388 petition requesting termination of mother's reunification services for failure to participate in her court-ordered treatment plan. Father requested that the court elevate his status as an alleged father to presumed father and stated his belief that his name was on the minor's birth certificate and that he signed a voluntary declaration of paternity in the State of Nebraska. Mother confirmed father was present at the birth of the minor. The court continued the hearing and ordered the Department to conduct a search of the voluntary declaration of paternity registry in Nebraska to confirm father's statement.

Father was present at the continued hearing on April 4, 2018. Father's counsel argued father's status should be elevated to presumed father of the minor. Minor's counsel objected. The court denied father's request. Father's counsel requested visitation with the minor and DNA testing. The court again ordered the Department to look into the voluntary declaration of paternity in the State of Nebraska. The court also ordered visitation with the minor by written correspondence, and DNA testing "[i]f the Department find[s] that the DNA testing could be beneficial." The court terminated mother's reunification services and set the matter for a section 366.26 hearing.

The May 2018 status review report stated father was released from jail in March 2018, arrested shortly thereafter for failure to appear in court, then released again. Father informed the Department that he was in a rehabilitation program, requested the Department's address so he could write to the minor, and stated he would do "everything in his power" to get the minor back.

Father again addressed the issue of parentage at the May 15, 2018, status review hearing.

At the August 21, 2018, continued selection and implementation hearing, father requested visitation. All parties objected. The court ordered that no visitation order would be made, stating the matter would be addressed at the continued hearing.

On September 4, 2018, father filed a section 388 petition requesting presumed father status, reunification services, visitation, and placement of the minor with him. Father argued he had been clean and sober since March 29, 2018, had completed a 90-day residential treatment program in July 2018, and had consistently appeared in court and continued to assert his desire to reunite with the minor despite having been denied presumed father status.

The contested section 366.26 hearing and the hearings on the parties' section 388 petitions commenced on September 11, 2018. The Department requested father's petition be denied, arguing there had not been any new information sufficient to elevate father's parental status. Minor's counsel argued father did not qualify for presumed father status. The court found no change in circumstances and denied father's petition. The court further found the minor adoptable, ordered a permanent plan of adoption, and terminated parental rights.

The parents filed timely notices of appeal.

DISCUSSION

1.0 Father's Lack of Standing to Appeal

The Department argues father lacks standing to challenge compliance with the ICWA requirements because he is not a parent under the ICWA.

Acknowledging he never claimed Indian heritage, father argues he is nevertheless entitled to challenge the lack of ICWA compliance to protect the interests of the minor (*In re A.B.* (2008) 164 Cal.App.4th 832, 839, fn. 4 (*A.B.*); 25 U.S.C. § 1914; Cal. Rules of Court, rule 5.486(a)), and that he may raise the issue on appeal in the absence of an

objection in the juvenile court (*In re Isaiah W.* (2016) 1 Cal.5th 1, 13-15; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 261). As we explain, father lacks standing.

Father's only challenge to the order terminating his parental rights pursuant to section 366.26 is the Department's asserted noncompliance with the inquiry and notice requirements of the ICWA. However, as an alleged father, he lacks standing to pursue his appeal. "The termination of parental rights may be challenged on the ground of lack of ICWA notice by the dependent child, a parent or Indian custodian from whose custody the child was removed, and the Indian child's tribe. (25 U.S.C. § 1914; rule 1439(n) [current rule 5.664].) The ICWA defines 'parent' as 'any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom.' (25 U.S.C. § 1903(9).) The ICWA expressly excludes from the definition of 'parent' an 'unwed father where paternity *has not been acknowledged or established*.' " (*In re Daniel M.* (2003) 110 Cal.App.4th 703, 707-708 (*Daniel M.*), italics added.)

In his reply brief, father argues he met the ICWA requirements for standing because he "acknowledged" he was the father of the minor pursuant to 25 U.S.C. § 1903(9), as demonstrated by the fact that he repeatedly confirmed to the court that he was the minor's father, he was present at the minor's birth as confirmed by counsel for mother, he made efforts to obtain custody of the minor and achieve presumed father status, he filed a motion to modify the order terminating mother's reunification services and to provide him with reunification services, and he confirmed he resided with the minor during the minor's entire life with the exception of four to five months prior to removal.

Father fails to provide any citation to legal authority supporting his arguments. " '[P]arties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat appellant's . . . issue as

waived.' " (*Daniel M., supra*, 110 Cal.App.4th at p. 708.) In any event, father's claim lacks merit.

"[B]ecause the ICWA does not provide a standard for the acknowledgment or establishment of paternity, courts have resolved the issue under state law. [Citations.] Courts have held an unwed father must take some official action, such as filing a voluntary declaration of paternity, establishing paternity in legal proceedings, or petitioning to have his name placed on the child's birth certificate. [Citations.] Similarly, in California an alleged father may acknowledge or establish paternity by voluntarily signing a declaration of paternity at the time of the child's birth, for filing with the birth certificate (Fam. Code, § 7571, subd. (a)), or through blood testing (Fam. Code, § 7551)." (*Daniel M., supra*, 110 Cal.App.4th at pp. 708-709, fn. omitted.) Father, who admittedly failed to appear in the dependency proceedings until 16 months after the petition was filed, has taken no such official action. He argues instead that the Department failed to determine whether he had previously filed a voluntary declaration of paternity in the State of Nebraska, obtain information pertaining to the minor's birth, or offer him the opportunity to complete a DNA test, and never provided the court with the minor's birth certificate. The argument is unavailing, as it was father who bore the burden of proof. (See *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, 585-586 [parent seeking to establish presumed parent status bears the burden of proof]; *In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1652-1653 [same].)

While father made some attempts to obtain presumed father status once he finally appeared and began participating over a year into the dependency proceedings, on this record we cannot conclude he "acknowledged or established" he was a parent within the meaning of title 25 United States Code section 1903(9). Therefore, father lacks standing to challenge a violation of the ICWA notice provisions and we must dismiss his appeal. (*Daniel M., supra*, 110 Cal.App.4th at p. 709.)

2.0 ICWA Error

Mother contends, and the Department concedes, that the Department failed to comply with the ICWA requirements by failing to send notices to all relevant tribes, failing to serve mother with copies of notices, omitting relevant information known to the Department, and failing to document its efforts regarding inquiry. We accept the Department's concession. As we explain, errors in compliance with the ICWA require conditional reversal and remand for further limited proceedings.

The ICWA's purpose is to protect the interests of Indian children and promote the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. §§ 1901, 1902, 1903(1), 1911(c), 1912; *In re Levi U.* (2000) 78 Cal.App.4th 191, 195-196 (*Levi U.*).)

The juvenile court and the Department have "an affirmative and continuing duty to inquire" whether a child is, or may be, an Indian child. (§ 224.2, subd. (a); Cal. Rules of Court, rule 5.481(a).) If, after the petition is filed, the court "knows or has reason to know that an Indian child is involved" (25 U.S.C. § 1912(a)), notice of the pending proceeding and the right to intervene must be sent to the tribe or the BIA if the tribal affiliation is not known. (See § 224.2, subd. (a)-(j); Cal. Rules of Court, rule 5.481(b); *In re Robert A.* (2007) 147 Cal.App.4th 982, 989.) "Proof of notice filed with the court must include *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030), return receipts, and any responses received from the Bureau of Indian Affairs and tribes." (Cal. Rules of Court, rule 5.482(b).)

First, the Department failed to send notices to all relevant tribes. The maternal grandfather and mother both provided information to the Department that mother's family had Pomo and Cherokee Indian heritage. The Department admittedly sent notices to only two of the 22 federally-recognized Pomo tribes and failed to send notice to any of the three federally-recognized Cherokee tribes.

Second, the notices the Department did send were deficient. ICWA notices must include all of the following information, if known: the child's name, birthplace, and birth date; the name of the tribe in which the child is enrolled or may be eligible for enrollment; names and addresses of the child's parents, grandparents, great-grandparents, and other identifying information; and a copy of the dependency petition. (§ 224.3, subd. (a)(5)(A)-(D); *In re Mary G.* (2007) 151 Cal.App.4th 184, 209.) As the Department admits, the notices it sent identified the minor's biological parents, but contained no information regarding either parent's lineal ancestors despite the fact that there were numerous maternal relatives available for inquiry, including the maternal grandfather and the maternal great-uncle who attended hearings, visited the minor, and were in regular contact with the Department. The Department's duty of ICWA inquiry extends to the minors' extended family, if known. (§ 224.2, subd. (c); Cal. Rules of Court, rule 5.481(a)(4).) The Department failed its duty of inquiry. The notices sent by the Department were insufficient for purposes of the ICWA.

Third and finally, the Department failed to adequately document its inquiry into mother's Indian ancestry. "In order for the court to make a determination whether the notice requirements of the ICWA have been satisfied, it must have sufficient facts, as established by the [Department], about the claims of the parents, the extent of the inquiry, the results of the inquiry, the notice provided any tribes and the responses of the tribes to the notices given. Without these facts, the juvenile court is unable to find, explicitly or implicitly, whether the ICWA applies." (*In re L.S.* (2014) 230 Cal.App.4th 1183, 1198; *In re E.W.* (2009) 170 Cal.App.4th 396, 404-405; *Levi U., supra*, 78 Cal.App.4th at p. 199.) The Department admittedly failed its duty to include relevant information in the ICWA notices or to provide clear and accurate information to the court regarding the results of its inquiry and notice.

"[E]rrors in an ICWA notice are subject to review under a harmless error analysis." (*In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1415.) Error is not presumed. It is mother's obligation to present a record that affirmatively demonstrates error. (*In re D.W.* (2011) 193 Cal.App.4th 413, 417-418.) Mother has done so here. In light of the Department's prudent concession, and given the state of the record, we cannot say the failure of the ICWA compliance was harmless. A failure to conduct a proper ICWA inquiry requires reversal of the orders terminating parental rights and a limited remand for proper inquiry and any required notice. (*A.B., supra*, 164 Cal.App.4th at p. 839; *In re D. T.* (2003) 113 Cal.App.4th 1449, 1454-1456.) We remand for limited ICWA proceedings and direct the Department to gather all necessary and relevant information, provide notice to any identified tribes as required, and present the relevant facts to the juvenile court.

DISPOSITION

Father's appeal is dismissed. The order terminating parental rights pursuant to section 366.26 is reversed and the matter is remanded to the juvenile court for limited ICWA proceedings consistent with this opinion. If, at the conclusion of those proceedings, no tribe indicates the minor is an Indian child within the meaning of the ICWA, then the order terminating parental rights shall be reinstated. If the court finds, after proper inquiry and notice, that the ICWA applies, the court shall hold such further proceedings as are appropriate. In all other respects, the juvenile court's orders are affirmed.

s/BUTZ, J.

We concur:

s/RAYE, P. J.

s/HULL, J.